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No. —

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

J. CLENTON HENSON and
SHEILA HENSON LUTZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a warrant which authorizes the seizure of "any and all records" of a business is sufficiently particular to meet the requirements of the Fourth Amendment.

2. Whether an individual who is not a transferor but who causes a transferor to give a false odometer statement to a transferee of an automobile may be criminally liable for the violation of the odometer disclosure requirements of the Motor Vehicle Information and Cost Savings Act.

LIST OF PARTIES

C. Alan Henson was also a party in the proceeding below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. Clenton Henson and Sheila Henson Lutz hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 848 F.2d 1374 (6th Cir. 1988). The opinion of the United States District Court for the Western District of Kentucky (App., *infra*, 24a) granting the petitioners' motion for bail pending appeal is reported at 663 F. Supp. 1112 (W.D. Ky. 1987).

JURISDICTION

The opinion of the court of appeals was entered on June 15, 1988, and a petition for rehearing was denied on

July 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> [N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

15 U.S.C. § 1988(b) provides in relevant part:

> No transferor shall violate any rule prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule.

At the time relevant to this case, 15 U.S.C. § 1990c(a) provided in relevant part:

> Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more than $50,000 or imprisoned not more than one year, or both.

49 C.F.R. § 580.3 provides in pertinent part:

> "Transferor" means any person who transfers his ownership in a motor vehicle by sale, gift, or any means other than by creation of a security interest.

STATEMENT

1. Petitioner Henson was indicted in the United States District Court for the Western District of Kentucky on one count of conspiracy to commit mail fraud, five counts of mail fraud in violation of 18 U.S.C. §§ 2 and 1341 and

ten counts of knowingly and willfully giving, or causing a transferor to give, false odometer statements in connection with the sale of motor vehicles in violation of 15 U.S.C. §§ 1988(b) and 1990c.[1] App., *infra*, 6a. Petitioner Henson was acquitted by the jury on all of the mail fraud counts [2] and four of the ten counts relating to false odometer statements. *Id.* On the conspiracy count on which he was convicted, petitioner Henson was sentenced to four-years' imprisonment and fined $120,000. On each of the six counts of giving, or causing a transferor to give, false odometer statements, petitioner Henson was sentenced to concurrent one-year sentences and fined $40,000. Thus, petitioner Henson received a total sentence of four-years' imprisonment and a $360,000 fine. Petitioner Lutz was indicted on one count of conspiracy to commit mail fraud and five counts of mail fraud. App., *infra*, 6a. She was acquitted on all of the mail fraud counts and sentenced to one-year's imprisonment and fined $10,000 on the conspiracy count.

2. The facts at issue in the case involved petitioners' business of financing used cars. App., *infra*, 3a. Petitioner Henson, Ralph Lutz and others purchased large numbers of used automobiles at auctions in California, Indiana, Missouri and Tennessee, using funds from accounts set up by petitioner Lutz at the Bank of Marshall

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[1] The conspiracy count in the indictment involves the years 1983 and 1984. The indictment charged six named defendants with conspiracy and the five mail fraud counts. The defendants were J. Clenton Henson, Dennis Henson, C. Alan Henson, Gary Ray, Ralph Lutz and Sheila Henson Lutz. App., *infra*, 6a. Dennis Henson and Gary Ray pleaded guilty to the conspiracy count and one mail fraud count. Ralph Lutz pleaded guilty to all counts on which he was charged. App., *infra*, 6a n.2. Alan Henson pleaded guilty to the conspiracy charge and one mail fraud count and was acquitted on the remaining mail fraud counts at trial.

[2] One count of mail fraud was *nolle prossed* by the government during trial.

County. App., *infra*, 2a.[3] The vehicles purchased at auction were made available by petitioner Henson to local automobile dealers, who then offered them for resale to the public. App., *infra*, 3a. Dealers who were unable to pay for an automobile in full paid a $50 financing fee. App., *infra*, 4a.

Evidence at trial indicated that for a fee of $50 to $100 dealers could receive a false odometer statement for the vehicles that they purchased. *Id.* One wholesale dealer testified that he would write on his checks the number of miles he wanted on the odometers of the cars he purchased and that petitioner Lutz would copy that mileage onto an odometer statement. *Id.* Another witness testified that Alan Henson and Ralph Lutz would tell him what mileage to put on each odometer. *Id.* There also was evidence that, on one occasion, petitioner Henson asked Ralph Lutz to alter an odometer. *Id.*[4]

Testimony at trial disclosed a number of methods by which the true mileage on the used automobiles could be concealed. One such method was to alter original title certificates. One witness testified that Alan Henson and petitioner Lutz physically cut the actual mileage off Cal-

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[3] The cars were purchased using the business names Dennis Used Cars, Gary Ray's Used Cars and Ron Walston Auto Sales with sight drafts which were then forwarded from the auction companies to the Bank of Marshall County for payment. App., *infra*, 2a. Upon receipt, the bank would notify petitioner Lutz or one of her co-workers who would then authorize payment to the auction firm.

[4] The court of appeals repeatedly refers to actions by "the Hensons" in its opinion. *See, e.g.*, app., *infra*, 2a, 3a, 4a. It is unclear whether the court of appeals is referring to the three appellants below (Clenton Henson, Alan Henson and Sheila Henson Lutz), the Hensons named in the indictment (Clenton Henson, Dennis Henson, Alan Henson and Sheila Lutz) or "the Hensons" as identified by Postal Inspector J. L. Edwards in his affidavit. App., *infra*, 10a ("David Henson Used Cars, Dennis Used Cars, Alan Henson Used Cars and Gary Ray's Used Cars, operated together and were collectively known as 'the Hensons' ").

ifornia titles. *Id.* A second method was to transfer vehicles from one dealer to another. In addition, two part-time secretaries for "the Hensons" testified that they filled out false odometer statements and that Alan Henson and petitioner Lutz forged dealers' names on odometer statements and other documents. App., *infra*, 4a-5a. A third method used to conceal the odometer rollbacks was to obtain a new title certificate from the states of Nevada or Mississippi through a Tennessee company called "APCO Leasing." App., *infra*, 5a.

3. On May 21, 1985, Postal Inspector J. L. Edwards swore out an affidavit in support of a search warrant for the business offices of petitioners in Benton, Kentucky. Affidavit for Search Warrant in *United States of America* v. *Clinton* [sic] *Henson et al.*, May 21, 1985 [hereinafter cited as "Affidavit"]. According to the affidavit, records provided by the Motor Vehicle Commission for the Commonwealth of Kentucky disclosed that 3,800 automobiles were titled to Dennis Used Cars and Gary Ray Used Cars during the six-month period from June 1983 through December 1983. Affidavit, 2-3. Of these 3,800 automobiles, Inspector Edwards "investigated seventy-six (76) automobiles which were purchased during the period June 1983 through December 1983 at various California auto auction dealers" by Dennis Used Cars and Gary Ray Used Cars. App., *infra*, 11a; Affidavit, 1. In his affidavit, Inspector Edwards stated that he compared California and Kentucky documents on these automobiles and found that the mileage on the Kentucky documents was significantly lower than that on the corresponding California paperwork. App., *infra*, 11a; Affidavit, 2. Based on the Inspector's two percent sample of cases, the magistrate issued a warrant for petitioners' Fourth Street business office which authorized a search for the following:

> any and all records, but not limited to modules, modems and connectors, computer, computer termi-

nals, hard copy user documentation pertaining to files and/or programs, cables, printers, discs, floppy discs, tapes, vendor phone numbers, all original and backup tapes and discs, any other informational data input, all vendor manuals for hardware and software, printouts, receipt books, ledger books, ledger cards, records of sales, odometer statements, file records on individual used car dealers, file records, payment receipts, bank transaction records, invoices regarding the purchase of used vehicles, automobile auction company records and/or lists, any correspondence from auto auction companies, and any motor vehicle titles for the period from June 1983 through the present, including but not limited to the following individuals and companies:

> Clinton [sic] Henson, Henson Motor Company, Sheila Lutz, Allen [sic] Henson, Ronnie Walston and/or Walston Used Cars, Charles Haley and/or Haley Used Cars, Charlie Aldridge, 79 Motors, Bob Pugh, Ralph Lutz, Shane Howard and T.S. Motors

Also, any other used car dealers conducting business with Henson Motor Co., and/or Allen [sic] Henson. It is also requested that the vehicle identification number and/or tag number be recorded on any vehicles found in the parking lot surrounding the building.

App., *infra*, 15a-16a.

On May 22, 1985, federal and state law enforcement officials executed the search warrant for the East Fourth Street Address and removed virtually every record, document and piece of paper on the premises. App., *infra*, 6a. On June 26, 1986, petitioners filed a motion to suppress evidence seized pursuant to the grossly overbroad warrant. The district court held a hearing on that motion, at which uncontradicted testimony established that, after the search, the only documents left in the building were those in a single folder that had apparently been dropped

on the floor. Tr. IV, 159, 166-67.[5] The trial judge, in an oral opinion, denied the motion to suppress. Tr. IV, 173-74, app., *infra*, 32a.

4. In affirming petitioners' convictions, the Sixth Circuit recognized that "[g]eneral warrants that fail to describe with particularity the things to be searched for and seized 'create a danger of unlimited discretion in the executing officer's determination of what is subject to seizure and a danger that items will be seized when the warrant refers to other items.' " App., *infra*, 16a, quoting *United States* v. *Savoca*, 761 F.2d 292, 298-99 (6th Cir.), *cert. denied*, 474 U.S. 852 (1985). However, the court, without elaboration, stated that the warrant in this case was "directed toward items likely to provide information concerning the Hensons' involvement in the odometer-tampering scheme." *Id.*[6] The court also relied upon the "inclusive" nature of the warrant to find that it sufficiently limited the officers' discretion. Finally, the court of appeals rejected the argument that the warrant should have been limited to the 76 automobiles in Inspector Edwards' survey on the ground that his affidavit

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[5] Petitioner Lutz testified that "[a] few pencils, one folder, pictures, my flower arrangement on my desk, [and] the telephones were left." Tr. IV, 166. Alan Henson testified that the only things remaining after the search were "[p]ictures, a Bible, telephones, trinkets [and] one folder." Tr. IV, 159. The Postal Inspectors seized personal papers of Alan Henson that were in folders labeled "Divorce Papers" and "Income Tax Returns or Funds." Tr. IV, 154-55. Evidence receipts indicated that the Postal Inspectors also seized a box of blank computer paper and boxes of unused checks.

[6] The court of appeals repeatedly relied on the need for flexibility in applying the particularity requirement. *See* app., *infra*, 16a ("Inspector Edwards could not have known at the time he applied for the warrant what precise records and files would contain information concerning the Hensons' involvement in the odometer-tampering scheme").

"suggested an ongoing scheme." App., *infra* 17a.[7] Thus, the court concluded that "the warrant was reasonably specific under the circumstances of this case." *Id.*

The court below also rejected petitioner Henson's argument that, since he was not a "transferor" for purposes of the Motor Vehicle Information and Cost Savings Act, he could not be criminally liable under that Act. The Sixth Circuit analogized the language of 15 U.S.C. § 1990c with that of 18 U.S.C. § 2(b), under which "defendants can be convicted as causers, even though they are not legally capable of personally committing the act forbidden by the federal statute." App., *infra*, 19a. The court held that "even assuming Clenton Henson was not a transferor within the meaning of section 1988(b), the jury could find that he adopted a transferor's acts and capacity by causing a transferor to commit a criminal act." App., *infra*, 19a-20a.[8]

REASONS FOR GRANTING THE PETITION

The opinion of the Sixth Circuit below conflicts with two significant lines of precedent applying the particularity requirement of the Fourth Amendment to search warrants for business records. First, the opinion below conflicts with the limitations recognized by this Court in *Andresen* v. *Maryland*, 427 U.S. 463 (1976). In *Andresen*, this Court relied heavily on the fact that the broadly worded warrants at issue limited the scope of the search

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[7] The court of appeals stated:

> Edwards had good reason to believe that some of the vehicles, and their accompanying documents, identified during the survey would no longer be on the premises when the warrant was executed, while others would have been added.

App., *infra*, 17a.

[8] The court specifically declined to follow *United States* v. *Powell*, 806 F.2d 1421 (9th Cir. 1986). App., *infra*, 21a.

to evidence regarding a specific crime and a specific transaction. The warrant approved by the Sixth Circuit in this case contained no such limitations or any other limitation. Second, the opinion below conflicts with decisions of the First, Eighth and Ninth Circuits holding that warrants containing language virtually identical to the language in question lacked sufficient particularity under the Fourth Amendment.

The decision below also raises a broader, recurring question concerning the application of the Fourth Amendment's particularity requirement to search warrants for business records. This Court has yet to pass on the propriety of a broadly worded warrant for "all business records." Without guidance from this Court on the degree of particularity required in such warrants, unrestricted searches of all business records may allow for the kind of " 'general, exploratory rummaging in a person's belongings' " that the Fourth Amendment generally prohibits. *Andresen*, 427 U.S. at 480, quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). This Court should grant the petition to decide whether such a warrant, unlimited in scope, satisfies the particularity requirement of the Fourth Amendment.

The opinion of the Sixth Circuit also raises a substantial and undecided issue of statutory interpretation of the odometer certification provisions of the Motor Vehicle Information and Cost Savings Act and creates a conflict with a decision of the Ninth Circuit interpreting the criminal provisions of that Act.

I. This Petition Raises An Important And Recurring Constitutional Question Regarding The Scope Of Searches For Business Records Under The Fourth Amendment.

1. The court of appeals' decision conflicts with this Court's decision on the warrant requirements of the Fourth Amendment in *Andresen* v. *Maryland*, *supra*. In *Andresen*, the petitioner alleged that warrants which au-

thorized a search for an exhaustive list of documents offended the particularity requirement of the Fourth Amendment because those warrants also contained the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." 427 U.S. at 479. In rejecting that claim this Court expressly relied upon the fact that the warrants, on their face, limited the scope of the search to evidence relating to a specific transaction—the "sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland." *Id.* at 480 n.10. Moreover, this Court, again relying on the plain language in the warrants, stated that it was "clear from the context that the term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T." *Id.* at 480-81.[9] Thus, the warrants in question—despite their broad phrasing—"did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T." *Id.* at 481-82 (footnote omitted).

The warrant approved by the Sixth Circuit in this case is completely lacking in the limiting principles relied upon by this Court in *Andresen*. First, the warrant was not limited to evidence of the alleged crimes—odometer tampering and mail fraud. The Sixth Circuit stated that "[t]he description in the warrant is directed toward items likely to provide information concerning the Hensons' involvement in the odometer-tampering scheme." App., *infra*, 16a. But, under the plain terms of the warrant, the executing officers were in no way constrained to search only for odometer-related records or for the

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[9] Each warrant authorized the search for specific categories of records "showing or tending to show a fraudulent intent and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland." *Id.* at 480 n.10.

specific documents listed in the warrant. Rather, these documents were merely a subset within the larger universe of "any and all records"—the authorized scope of the search warrant.[10] The warrant plainly authorized an unrestrained general search for "any and all records" and, in fact, "all records" were seized.

Second, unlike the search which this Court sanctioned in *Andresen*, the warrant here was not limited to any specific transactions. The Postal Inspector who obtained the warrant had investigated 76 automobiles purchased in California between June 1983 and December 1983. App., *infra*, 11a. While this Court in *Andresen* relied heavily on the fact that the scope of the search was limited to evidence related to Lot 13T, the Sixth Circuit did not require that the search be limited to documents relating to those 76 automobiles or even to automobiles from any specific state.[11] Instead, the court below simply noted that there was "good reason to believe that *some* of the [76] vehicles, and their accompanying documents, identified during the survey would no longer be on the premises when the warrant was executed, while others would have been added." App., *infra*, 17a (emphasis added). Thus, the court asserted that "the warrant in this case was as 'specific as the nature of the activity under investigation permitted.'" App., *infra*, 17a, quot-

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[10] The Sixth Circuit stated that "[b]ecause the warrant in this case was 'inclusive,' it did not leave room for the officers to exercise unlimited discretion." App., *infra*, 16a-17a, citing *United States* v. *Savoca*, 761 F.2d 292, 299 (6th Cir.), *cert. denied*, 474 U.S. 852 (1985). But that is an absurd response to an argument that the warrant lacked "particularity." It is true that an all-inclusive warrant eliminates discretion, but it is hardly a comfort to a citizen to find out that the governmental seizure of all of his personal papers in an office was not a discretionary act.

[11] The Ninth Circuit has recognized that "[t]he Court's heavy reliance [in *Andresen*] on the Lot 13T limitation suggests that the omission of such a limitation would have been fatal to the warrant's validity." *United States* v. *Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982).

ing *United States* v. *Shoffner*, 826 F.2d 619 (7th Cir.), *cert. denied sub nom. Stange* v. *United States*, 108 S.Ct. 356 (1987). But, the court offered no explanation why the possible absence of documentation on some of the specific transactions (involving the 76 vehicles) justified the issuance of a warrant that was completely lacking in *any* specificity with respect to the transactions involved. Such a conclusion conflicts with this Court's holding in *Andresen*.

2. The Sixth Circuit's opinion also conflicts directly with decisions in the First, Eighth and Ninth Circuits striking down warrants for business records that were nearly identical to the warrant in this case. The Eighth Circuit has held that a warrant that authorized a search for "all bail bond records" including a long list of categories of documents of a company was a general warrant that violated the Fourth Amendment. *In re Grand Jury Proceedings*, 716 F.2d 493, 498-99 (8th Cir. 1983). The court, relying on the limitations enunciated by this Court in *Andresen*, stated:

> The scope of the search was otherwise unlimited: the warrant did not indicate that the documents sought pertained to any specific transactions, did not identify the offenses on which evidence was sought, and did not confine the search to any particular files or categories of documents.

Id. at 497. In characterizing the warrant—which was substantially identical to the warrant in this case—the Eighth Circuit stated that "it is difficult to imagine a search warrant stated in more general terms." *Id.* (footnote omitted).

Similarly, in *Rickert* v. *Sweeney*, 813 F.2d 907 (8th Cir. 1987), the Eighth Circuit invalidated a warrant which authorized a search for "records, documents, papers, correspondence and similar evidence relating to the period January 1, 1980 through April 30, 1986, including but not limited to" certain categories of docu-

ments. *Id.* at 908. In *Rickert*, as in this case, federal agents relied upon the broadly worded warrant to seize virtually all of the records at the premises. *Id.* In invalidating the warrant, the Eighth Circuit noted that such a lack of specificity impermissibly "authorize[d] general rummaging through the offices and company records." *Id.* at 909.[12]

Both the First and Ninth Circuits have reached the same conclusion in cases involving warrants employing language that cannot be distinguished from the warrant issued to seize all of petitioners' business records. The First Circuit has held that a warrant authorizing the seizure of "books, records, documents, consisting of but not limited to" a list of categories of documents "which are evidence, fruits and instrumentalities of the violation of [the mail fraud statute]" was insufficiently particular under the Fourth Amendment. *United States* v. *Roche*, 614 F.2d 6, 7 (1st Cir. 1980). The court of appeals noted that requiring such particularity would not hamper law enforcement efforts because a properly limited warrant "could have been limited to documents relating to automobile insurance." *Id.* at 8.

Similarly, in *United States* v. *Cardwell*, 680 F.2d 75 (9th Cir. 1982), the Ninth Circuit held that a warrant authorizing seizure of "corporate books and records, including but not limited to" specific categories of documents violated the Fourth Amendment. *Id.* at 76.[13] In

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[12] The court noted that there was no finding of a "pervasive scheme to defraud the IRS" and thus no basis for seizing all of the business records. *Id.* at 909.

[13] The warrants disapproved in both *Cardwell* and *Roche* are arguably *more* particular than the warrant approved by the Sixth Circuit in this case. Both of the warrants in *Cardwell* and *Roche* were limited to evidence relating to violations of specific statutes, but the courts held that these broad statutory provisions—tax evasion and mail fraud respectively—were insufficient to particularize the search as required by the Fourth Amendment.

Cardwell, the court of appeals specifically relied on the fact that "[t]he results of [the Internal Revenue Service] investigation . . . were not used to refine the scope of the warrant." *Id.* at 78.[14] In this case, the results of Postal Inspector Edward's investigation were available—but not used—to limit the scope of the warrant for petitioners' business. Given these decisions, it seems clear that if petitioners' Fourth Amendment challenge had been made in any of these circuits, the search and seizure of petitioners' business records would have been declared unconstitutional.[15]

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[14] In another recent case, *United States* v. *Spilotro*, 800 F.2d 959 (9th Cir. 1986), the Ninth Circuit struck down a warrant authorizing the seizure of, among other things, "notebooks, notes, documents, address books and other records, . . . which are evidence of violations of 18 U.S.C. §§ 1084, 1952, 1955, 892-894, 371, 1503, 1511, 2314, 2315, 1962-1963," on the ground that the warrant was insufficiently particular. *Id.* at 961. The court in *Spilotro* stated that the warrant would have been sufficiently particular if it described the items to be seized in greater detail or described the criminal activities themselves. *Id.* at 964.

[15] A separate, but related, line of authority in the courts of appeals has authorized broad searches for all the business records of entities which are permeated with fraud or the entire business of which is a scheme to defraud. *See, e.g., United States* v. *Brien*, 617 F.2d 299, 309 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980) (probable cause to find pervasive scheme to defraud). In *United States* v. *Bentley*, 825 F.2d 1104 (7th Cir.), *cert. denied*, 108 S.Ct. 240 (1987), for example, the Seventh Circuit upheld a warrant that set out twenty-one categories of documents that constituted all of the business records of Universal Precious Metals, Inc. The court stated:

> This is the rare case in which even a warrant stating "Take every piece of paper related to the business" would have been sufficient. Universal was fraudulent through and through . . . . When the whole business is a fraud, the warrant properly may permit the seizure of everything the agents find.

Id. at 1110. Neither the district court nor the court of appeals found that there was probable cause to believe that petitioners'

3. In sum, the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This Court has frequently reiterated that

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Stanford v. *Texas*, 379 U.S. 476, 485 (1965), quoting *Marron* v. *United States*, 275 U.S. 192, 196 (1927). See *Andresen*, 427 U.S. at 480. The warrant at issue in the instant case does not even come close to meeting the particularity standard; instead, it authorized the police to search for "any and all records" at petitioners' business. A warrant that is so completely lacking in description of the "things to be seized" is nothing more than a general warrant—the specific evil that the Fourth Amendment was intended to prohibit. See *Maryland* v. *Garrison*, 107 S.Ct. 1013, 1017 (1987); *Stanford*, 379 U.S. at 480-81.

As this Court has recognized, business records searches in fraud or "white collar" criminal cases pose especially troublesome problems under the Fourth Amendment. In *Andresen*, this Court noted that:

> there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those

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business was permeated with fraud. *See Rickert* v. *Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987) (district court failed to find pervasiveness and government did not request finding). Thus, this exception cannot support the general warrant issued in this case.

> papers authorized to be seized. . . . [R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Andresen, 427 U.S. at 482 n.11. The decision below completely failed to heed the Court's admonition in *Andresen*, and its ruling has thus opened the door to limitless searches and seizures of business records in the Sixth Circuit.

II. The Decision Below Raises A Substantial Issue Of Statutory Interpretation Of The Odometer Tampering Statute.

Title IV of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981 *et seq.*, seeks "to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers." 15 U.S.C. § 1981.[16] Section 1988(b) provides that "[n]o transferor shall violate any rule prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule." In turn, Section 1988(a) requires the Secretary of Transportation to prescribe rules which require any transferor of a motor vehicle to disclose in writing to a transferee the cumulative mileage registered on the odometer of the vehicle.[17]

The regulations define a "transferor" as "any person who transfers his ownership in a motor vehicle by sale, gift, or any means other than by creation of a security interest." 49 C.F.R. § 580.3. In 1976, the Act was amended to include the following criminal provision under which petitioner Henson was convicted:

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[16] Only petitioner Henson is seeking review of this issue.

[17] These regulations are codified at 49 C.F.R. pt. 580.

> Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more than $50,000 or imprisoned not more than one year, or both.

15 U.S.C. § 1990c(a), Pub. L. 94-364, Title IV, § 408(2), 90 Stat. 985.[18]

The decision below raises a substantial issue of statutory interpretation under the Act and appears to conflict with the Ninth Circuit's opinion in *United States* v. *Powell*, 806 F.2d 1421 (9th Cir. 1986). In *Powell*, the defendant was convicted on six counts of falsely certifying automobile odometer statements in violation of 15 U.S.C. §§ 1988(b) and 1990c—the same provisions on which the petitioner was convicted—and 18 U.S.C. § 2.[19] In overturning the defendant's convictions, the Ninth Circuit stated that "[a] person cannot violate § 1988(b), even if he willfully provides false mileage information to a transferee, unless he is a 'transferor.'" *Id.* at 1423.[20]

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[18] This provision was amended in 1986 to increase the maximum term of imprisonment to three years. 15 U.S.C. § 1990c(a), Pub. L. 99-579, § 3(b), 100 Stat. 3311.

[19] Powell was the sales manager of a company which purchased used automobiles from dealer auto auctions and resold them to used car retailers. *Id.* at 1422.

[20] The Seventh Circuit has also implied that one must be a "transferor" to be convicted under sections 1988(b) and 1990c. In *United States* v. *Ellis*, 739 F.2d 1250 (7th Cir. 1984), the court reversed a decision granting judgment of acquittal on two counts of giving a false odometer statement. *Id.* at 1254. The lower court had granted the motion for judgment of acquittal on the ground that the defendant was not a "transferor" under the Act. *United States* v. *Arthalony*, 559 F. Supp. 1385, 1388 (C.D. Ill. 1983), *rev'd sub nom. United States* v. *Ellis*, 739 F.2d 1250 (7th Cir. 1984). The Seventh Circuit's opinion did not question the district court's conclusion that "transferor" status was a predicate to conviction

The court held that because the defendant did nct have a legal or beneficial ownership interest in the vehicle, he was not a "transferor" and could not be convicted under the Act.[21]

The Sixth Circuit refused to follow the Ninth Circuit's opinion in *Powell*. The court below held that "even assuming [petitioner Henson] was not a transferor within the meaning of section 1988(b), the jury could find that he adopted a transferor's acts and capacity by causing a transferor to commit a criminal act." App., *infra*, 19a-20a. The Sixth Circuit stated:

> If we were to accept [petitioner Henson's] interpretation, that only transferors who give or cause to be given a false odometer statement can be convicted, we would create a gaping loophole in the law that would hinder, rather than promote, accurate reporting of mileage information to the consumer. Consider, for example, an automobile dealer's corrupt employee, who alters the odometer statements of his employer's vehicles without the latter's knowledge. Under [petitioner Henson's] interpretation, this employee could not be convicted under section 1990c because he is not a transferor. We do not believe the Act countenances such an outcome.

App., *infra*, 20a. This statement displays a fundamental misconception of petitioner Henson's argument and of the criminal provisions of the Act.

Petitioner Henson's interpretation of the statute does not, in fact, create any loopholes. Section 1990c criminalizes violations of Title IV of the Act. Petitioner Henson—like the appellant in *Powell*—was charged with vio-

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under section 1988, but instead held that the defendant was, in fact, a transferor. *Ellis*, 739 F.2d at 1254.

[21] The Ninth Circuit did not specifically address the issue of whether the defendant could have "caused" a violation of § 1988 since that argument was raised for the first time on appeal. *Powell*, 806 F.2d at 1423.

lations of section 1988(b), to which criminal liability attaches under section 1990c. The Sixth Circuit's hypothetical "corrupt employee" could not properly be convicted under sections 1988(b) and 1990c, because he is not a "transferor." But the "corrupt employee" could be convicted under sections 1984 and 1990c. Section 1984 provides "[n]o person shall . . . alter or cause to be . . . altered the odometer of any motor vehicle with intent to change the number of miles indicated thereon." 15 U.S.C. § 1984. See *United States* v. *Townsend*, 796 F.2d 158 (6th Cir. 1986) (upholding conviction under section 1984); *United States* v. *Cina*, 699 F.2d 853 (7th Cir.), *cert. denied*, 464 U.S. 991 (1983) (same). In both *Townsend* and *Cina*, the courts correctly found that the plain language of section 1984 makes *causing* someone to alter an odometer a violation of the Act. But, there is no parallel "causation" language in the certification requirements of section 1988. Therefore, the Sixth Circuit erred in reading such a requirement into the statute in an effort to avoid a nonexistent "loophole" in the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 87-5132, 5138, 5144

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

J. CLENTON HENSON (87-5132);
SHEILA HENSON LUTZ (87-5138); &
C. ALAN HENSON (87-5144),
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Kentucky

Decided and Filed June 15, 1988

Before: NELSON and BOGGS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

BOGGS, Circuit Judge. J. Clenton Henson and Sheila Henson Lutz, his daughter, were convicted by a jury of one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371 (1982). Clenton Henson was also found guilty of six counts of giving, or causing a transferor to give, a false odometer statement to a transferee of an automobile, in violation of 15 U.S.C. §§ 1988(b)

and 1990c (1982). C. Alan Henson, Clenton's son, pled guilty to the conspiracy charge and to one count of mail fraud, in violation of 18 U.S.C. §§ 2 and 1341 (1982). Finding no merit to the contentions raised on appeal, we affirm the convictions and the sentences.

I

We will briefly review the pertinent facts, supplementing our discussion as we consider the various contentions raised. We, of course, view the evidence in the light most favorable to the government. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The government must be given the benefit of all inferences which can reasonably be drawn from the evidence. *United States v. Adamo*, 742 F.2d 927, 932 (6th Cir. 1984) (and cases cited therein), *cert. denied sub nom. Freeman v. United States*, 469 U.S. 1193 (1985).

The government presented evidence that the defendants, Clenton Henson, Sheila Lutz and Alan Henson, were involved in an extensive odometer-tampering scheme. Clenton Henson, Ralph Lutz (Clenton's son-in-law) and others associated with the Henson organization purchased large numbers of late-model, high-mileage automobiles in California, Indiana, Missouri and Tennessee, using such names as Dennis Used Cars, Gary Ray's Used Cars and Ron Walston Auto Sales. Ralph Lutz testified that although these names represented real dealers, none of them had any connection with the automobiles bought in their names. The money used to purchase these vehicles came from accounts in these dealers' names, which Sheila Lutz had established at the Bank of Marshall County, but the Hensons owned and controlled the funds therein.

The Hensons purchased used cars with "sight drafts." Richard Guyer, general manager of the Auto Dealers Exchange in Indianapolis, Indiana, explained the sight draft process as follows:

> Purchases by sight draft [are] just another form of payment for a vehicle. The sight draft, by definition, is an envelope-type form that has basic information and spaces on the front, description of the vehicle, the price paid for the vehicle. It's signed much as a check is. Being in the form of an envelope for payment, the auction must take a transferral statement, title and odometer statement, . . . insert them in the draft and they are forwarded to the purchaser's bank for subsequent payment.

According to Guyer, the sight drafts would be sent by mail from the auction to the purchaser's bank.

When the Hensons purchased automobiles at auction, the sight drafts would be sent to the Hensons' bank, the Bank of Marshall County, for payment. Edna Collins, a bank employee who dealt extensively with the Hensons, testified that when the sight drafts arrived, she would call Sheila Lutz or one of her co-workers (Carol Lindsey or Sheila Tinsley) to verify the draft. According to Collins, they would

> open the drafts and make sure that the title and everything is correct. And then whenever they okay the draft they either pay me by check or pick up the draft, or sometimes they would bring several checks in all from auto auctions, to pay them and I in turn would issue a cashier's check and mail back to the bank that I got the drafts from.

Sheila Lutz handled the sight drafts for Gary Ray's Used Cars, Ron Walston Auto Sales and other dealers, but Collins understood that the funds drawn on these dealers' accounts belonged to Clenton Henson.

Clenton Henson was in the business of financing automobiles, and the vehicles he purchased at auction were available to local automobile dealers for possible resale to the public. Clenton charged these dealers two types of

fees. The financing fee cost $50 and was required of dealers who could not afford to pay for an automobile in full. The false odometer fee, which was an additional $50 or $100, entitled the dealer to a false odometer statement. Charles Haley, a wholesale automobile dealer, testified that he would often pay an extra $50 for a false odometer statement. Haley would write on his financing check the number of miles he wanted on the automobile odometer and Sheila Lutz would copy that number on the odometer statement.[1]

Clenton Henson asked Ralph Lutz to alter an odometer on one occasion, but mostly Joey Galloway did the dirty work. Galloway testified that Alan Henson and Ralph Lutz would call and tell him what mileage to put on each car. Galloway would receive $10 for his labors.

The Hensons used a variety of methods to conceal the rollback scheme. One such method was to alter the original title certificates, which reflected the accurate mileage. On some occasions, the defendants erased or typed over the mileage printed on the title documents. Ralph Lutz testified that he saw both Alan Henson and Sheila Lutz slicing the mileage off California titles.

The Hensons would also conceal the scheme by transferring vehicle ownership from one dealer (usually a coconspirator to another. This method required the fabrication of title certificates, bills of sales, and odometer statements. The Hensons kept a stack of signed, blank odometer statements for this purpose. Sheila Tinsley, a part-time secretary for the Hensons, testified that she saw Sheila Lutz and Alan Henson forge dealers' names on bills of sale, odometer statements, automobile titles and registration forms. She admitted writing false bills of

[1] Haley also testified that, although the automobiles purchased from the Hensons would be in the name of "Gary Ray's Used Cars" or "Dennis Used Cars," he neither paid nor personally dealt with Gary Ray or Dennis Henson.

sale, signing the names of Ron Walston and Gary Ray. She also filled out false odometer statements, using such dealers' names as Bud Swink, Charlie Aldridge, Gary Ray, Ron Walston and others, and occasionally forged the name of a notary public. Carol Lindsey, another secretary for the Hensons, made similar comments. At the behest of Alan Henson and Sheila Lutz, she filled out false odometer statements, title certificates and bills of sale.

When document alterations were not feasible, the Hensons would obtain a new title certificate (from Nevada or Mississippi) through a Tennessee company called APCO Leasing. According to Sheila Tinsley, the Hensons would pay APCO Leasing to "get the miles off the title." She would use Alan Henson's checking account to pay APCO Leasing, even though the cars were in the names of Dennis Used Cars, Ron Walston Auto Sales and others. Ron Walston stated that when he wanted a title "washed" through APCO Leasing, Alan Henson and Sheila Lutz would do it for him.

In order to provide legitimacy to their scheme, the Hensons enlisted the unwitting assistance of the Marshall County Sheriff's Office. Under Kentucky law, a car dealer can pay the local sheriff's office to verify the vehicle identification number (VIN) and the odometer reading. The sheriff issues an inspection slip after comparing the VIN and the mileage listed on the title certificate with those of the car.

The Hensons requested hundreds of inspections between 1983 and 1984. Either Clenton Henson, Alan Henson or Sheila Lutz would tell the sheriff's deputies which cars to inspect. They would request that the inspection slips be issued in the names of Dennis Used Cars, Gary Ray's Used Cars or Ron Walston Auto Sales.

Despite the simplicity of the inspection process, deputies were often told that automobiles were not ready for

inspection. Deputy Bill Bryant testified that he remembered being told that certain cars were not ready for inspection, even though he was in the process of examining the documents, because the titles had not yet come in the mail. In those instances where he was asked to inspect the vehicle later, he found "a discrepancy" in the mileage reading from the time he first viewed the vehicle.

On May 22, 1985, federal and state law enforcement officials executed a search warrant at the Hensons' business address on East Fourth Street in Benton, Kentucky. Postal Inspector Joe Edwards's affidavit supported the warrant. In executing the search warrant, the officers seized automobile title documents, blank odometer statements, record books, checkbooks, other papers and computer equipment.

On March 4, 1986, the defendants were indicted along with three others, Dennis Henson, Gary Ray and Ralph Lutz.[2] Count one charged a conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371; counts two through six charged mail fraud, in violation of 18 U.S.C. §§ 1341 and 2; and counts seven through sixteen charged Clenton Henson with giving, or causing a transferor to give, a false odometer statement in violation of 15 U.S.C. §§ 1988 (b) and 1990c.

Before trial, Alan Henson pled guilty to the conspiracy count and a substantive mail fraud count. He was tried on the remaining charges. Clenton Henson and Sheila Lutz pled not guilty to all counts. On January 1, 1987, the jury convicted Clenton Henson and Sheila Lutz of conspiracy to commit mail fraud. Clenton Henson was also convicted of six counts of giving, or causing a transferor to give, a false odometer statement. Alan Henson was acquitted of the charges he faced at trial.

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[2] Dennis Henson and Gary Ray pled guilty to conspiracy to commit mail fraud and to one substantive mail fraud count. Ralph Lutz pled guilty to the conspiracy charge and five counts of mail fraud.

The district court, in addition to imposing prison terms, fined Alan Henson $20,000 and Clenton Henson $120,000 on count one of the indictment, under the Criminal Fine Enforcement Act of 1984, Pub. L. 98-596, 98 Stat. 3137, codified at 18 U.S.C.A. § 3623.

II

Clenton Henson and Sheila Lutz challenge their convictions on count one of the indictment, which charged a conspiracy to commit mail fraud. The mail fraud statute prohibits the use of the mails "for the purpose of executing" a scheme to defraud. 18 U.S.C. § 1341. As we noted in *United States v. Castile*, 795 F.2d 1273, 1277-78 (6th Cir. 1986), a conviction for mail fraud requires proof of three elements: 1) a scheme to defraud 2) which involves a use of the mails 3) for the purpose of executing the scheme.

At issue in this appeal is the third element: whether the use of the mails was "for the purpose of executing" the defendants' odometer-tampering scheme. *Castile* teaches that to meet this standard, the mailings need not be essential to the scheme, but must be " 'sufficiently closely related to [the] scheme.' " *Id.* at 1278 (quoting *United States v. Maze*, 414 U.S. 395, 399 (1974)). In other words, "for a mailing to be in furtherance of a scheme, the scheme's completion or the prevention of its detection must have depended in some way on the charged mailing." *Ibid.* (and cases cited therein).

It is also clear that the mailings need not be "false" to be in furtherance of a scheme to defraud. *United States v. Benny*, 786 F.2d 1410, 1420 (9th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 668 (1986). The mailings may be innocuous by nature, but they may still support a mail fraud conviction if they are an "expectable part of a larger scheme." *United States v. Green*, 786 F.2d 247, 249 (7th Cir. 1986). *See also ibid.* (the statute applies if the mailing is "a step in the plot"). "The causal con-

nection between the mailing and the success of the scheme, not the knavery in the mailings, is what matters." *Ibid.*

The defendants argue that the "routine business mailings" in this case, the sight drafts, took place before any fraudulent acts occurred; that is, before the dealers decided to roll back the odometers. Since the only mailings in this case were simply for the purpose of purchasing used cars, and not for selling used cars with rolled-back odometers and false odometer statements, the mailings were not in furtherance of the scheme to defraud; nor were they an integral part of the execution of the scheme. As Clenton Henson summarizes, "[a]t the time the vehicles were purchased, there was no evidence of fraudulent intent to roll back odometers. Accordingly, at the time the U.S. Mail was used for the purchase of vehicles, no fraudulent scheme was operating."

In assessing this argument, it is important to consider the mailings at issue in this case. As noted, the Hensons purchased used cars at several auctions under the guise of various dealers' names: Gary Ray's Used Cars, Ron Walston Auto Sales and others. When a vehicle was purchased, a sight draft, containing pertinent documents, would be sent by mail from the auction dealer's bank to the Hensons' bank, the Bank of Marshall County. Edna Collins, a bank employee, testified that when the sight drafts arrived, she would notify Sheila Lutz or her coworkers, who would come to the bank to verify the draft. Once Collins received authorization to pay the draft, she would usually send a cashier's check by mail to the auction dealer's bank.

The defendants' contention presupposes that the automobiles were purchased first, and the fraudulent activity occurred thereafter without their involvement or knowledge. However, the government alleged, and the record supports the finding, that the Hensons were involved in

an ongoing odometer-tampering scheme throughout 1983, 1984 and during the early part of 1985. *See United States v. Galloway*, 664 F.2d 161, 164-65 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982). Because this ongoing scheme required a continuous supply of used cars, which were procured through the mailings at issue in this case, the jury could reasonably have concluded that the defendants used the mails to purchase automobiles for the express purpose of rolling back odometers. *See United States v. Green*, 786 F.2d at 250-51. The mailings were thus an integral part of the execution of the scheme to defraud.

The mailings in this case were integral to the scheme in a second respect. The mailings were used to purchase automobiles under various aliases. By concealing the identities of the true purchasers, these aliases insulated the Hensons from repercussions that might result from the scheme. The aliases were also necessary because many of the purchasers in the Henson organization, such as Ralph Lutz, either did not have an automobile dealer's license or could not participate in certain auctions as a result of previous mileage inaccuracies. In this sense, the mailings "facilitate[d] concealment of the fraudulent scheme." *Castile*, 795 F.2d at 1273.

Finally, the record contains evidence, viewed in a light most favorable to the government, that the Hensons used the mails to "wash" high mileage titles through a Tennessee company called APCO Leasing. The defendants apparently would use APCO Leasing when they could not alter the titles themselves. There can be little doubt that this use of the mails was an integral part of the scheme to defraud. *See United States v. Fallon*, 776 F.2d 727 (7th Cir. 1985); *United States v. Lindsey*, 736 F.2d 433 (7th Cir. 1984); *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982).

The defendants argue that none of the alleged coconspirators actually used the mails, nor did they have

"actual knowledge that the Bank of Marshall County was using the mails to send cashier's checks." On this record, however, the jury was entitled to conclude otherwise. "[O]ne 'causes' the mails to be used if he 'does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be forseen,' even though use of the mails was not actually intended." *United States v. Shryock*, 537 F.2d 207, 209 (5th Cir. 1976) (quoting *Pereira v. United States*, 347 U.S. 1, 8-9 (1954)), *cert. denied*, 429 U.S. 1100 (1977). *See also United States v. Reed*, 721 F.2d 1059, 1060-61 (6th Cir. 1983). We believe it was reasonably foreseeable that the mails would be used during the course of the scheme not only to purchase used cars under various aliases, but to launder titles to reduce mileage.

In sum, the jury could find that the mailings in this case were for the purpose of executing a scheme to defraud. Accordingly, the defendants' challenge to their convictions on count one of the indictment is without merit.

III

Clenton Henson and Sheila Lutz contest various aspects of the seizure of documents from their East Fourth Street business office in Benton, Kentucky. First, they argue that Postal Inspector Edwards's affidavit in support of the search warrant contained material misrepresentations and, as a result, the warrant issued by the magistrate was invalid.

In his eight-page affidavit, Inspector Edwards described the fifteen-month investigation leading up to his request for the search warrant. Edwards's investigation, initiated in March 1984, revealed that four used-car businesses, David Henson Used Cars, Dennis Used Cars, Alan Henson Used Cars and Gary Ray's Used Cars, operated together and were collectively known as the "the Hensons." From June until December, 1983, the Hensons bought used cars in California and shipped them to Kentucky.

According to the affidavit, Edwards and a Kentucky police officer "personally investigated seventy-six (76) automobiles which were purchased during the period June 1983 through December 1983 at various California auto auction dealers. . . ." The buyers of these vehicles were Dennis Used Cars and Gary Ray's Used Cars. Automobile invoices and odometer statements obtained from the auction companies indicated that the buyers of these vehicles included Clenton Henson, Alan Henson and Ralph Lutz. These cars were shipped to the Hensons' East Fourth Street address in Benton, Kentucky.

During his investigation of these automobiles, Edwards inspected copies of Kentucky motor vehicle registrations, title applications, automobile inspection forms and odometer statements. These documents were compared to the out-of-state motor vehicle titles and automobile auction invoices obtained from the auction companies in California. On the basis of this comparison, Edwards concluded: "It has been determined [that] the mileage on all of the corresponding Kentucky documents was significantly lower than mileage stated on the auction invoices and/or out-of-state titles from the California automobile auction dealers."

In his affidavit, Edwards also indicated that he talked to two automobile dealers who had business dealings with Clenton Henson. On May 16, 1985, Edwards spoke to Charles Aldridge, owner of Charlie's Used Cars. Aldridge, who had cars financed by Clenton Henson, told Edwards that "[f]or an additional $100 to $50 [above the financing fee], any dealer can get a signed affidavit regarding the roll-back mileage on any vehicle purchased from the Henson's [sic]."

That same day, Edwards spoke to Charles Haley, owner of Haley Used Cars. According to the affidavit, "Haley stated he had purchased and financed used cars which had rolled-back mileage through Clinton [*sic*] Henson

during 1983 and 1984. . . . For $50 Clinton [*sic*] would also provide an affidavit indicating the roll-back mileage on a vehicle. When he financed a car through Henson, he usually worked through Sheila Lutz, Sheila Tinsley or Mildred McCardy."

A

Clenton Henson and Sheila Lutz argue that Edwards fabricated his conversations with Aldridge and Haley. Relying on *Franks v. Delaware*, 438 U.S. 154 (1978), they contend that the affidavit should be reviewed for probable cause without the false portions. In *Franks*, the Supreme Court held that a search warrant must be voided and the fruits of the search excluded if a defendant shows by a preponderance of the evidence that a warrant affidavit includes a false statement made knowingly and intentionally or with reckless disregard for the truth and if, with the affidavit's false material excluded, the affidavit is insufficient to establish probable cause. *Id.* at 155-56.

The district court held a *Franks* hearing to consider the defendants' allegations. Although Aldridge testified that he never received a false odometer statement specifically from Clenton Henson, he did admit regularly receiving "a false odometer statement from the Fourth Street shop" in Benton, Kentucky where the Hensons maintained their business. He stated that he paid a fee of $50 or $100 to "Sheila," who would in turn provide the false statements.

Charles Haley testified that he had never bought a false odometer statement or title from Clenton Henson, yet he did acknowledge receiving false documents from Clenton Henson's business. On cross-examination, he stated that he did get false odometer statements from Sheila Lutz for $50. He also responded affirmatively when asked whether he knew he could get false odometer statements when he made financing arrangements with Clenton Henson.

The district court determined that Clenton Henson and Sheila Lutz did not meet their burden of establishing by a preponderance of the evidence that the contested portions of Edwards's affidavit contained false statements made knowingly and intentionally or with reckless disregard for the truth. On the basis of the testimony discussed above, the district court's finding is not clearly erroneous. At best, the testimony of Aldridge and Haley indicates that they did not receive false documents from Clenton Henson personally, but did receive them from the Henson organization. This testimony is not inconsistent with Inspector Edwards's statements in his affidavit.

Having rejected the defendants' claim that certain portions of the affidavit should be disregarded, we have little trouble in concluding that the affidavit provided probable cause for issuance of the search warrant. *Illinois v. Gates*, 462 U.S. 213 (1983). In particular, the affidavit contained the incriminatory statements of Haley and Aldridge, as well as Edwards's personal survey of 76 automobiles, which suggested that all 76 had false odometer readings. The affidavit also recounted the statements of a confidential informant, who outlined the Henson operation in great detail. Edwards verified much of this information during the course of his lengthy investigation.

B

Next, Clenton Henson and Sheila Lutz argue that Edwards's affidavit, insofar as it suggested criminal activity, was based on information (the survey) that was over a year old. Since the affidavit contained "stale" information, it could not support a finding of probable cause. We disagree.

The affidavit also contains the May 1985 statements of Aldridge and Haley; these statements were made the same month that Edwards applied for the warrant. Thus,

even assuming the survey was in some respect "stale," that would not prevent a finding of probable cause. *See Emery v. Holmes*, 824 F.2d 143, 149 (1st Cir. 1987) ("Where recent information corroborates otherwise stale information, probable cause may be found."). Further, the affidavit suggests that the defendants were involved in an extensive odometer-tampering scheme, operating over a long time period. As the Eleventh Circuit has said:

> The function of a staleness test in the search warrant context is not to create an arbitrary time limitation within which discovered facts must be presented to a magistrate. Rather, the assay focuses on one relevant part of the determination that reasonable probable cause exists to warrant the issuance of an order to . . . perform a search. . . .
>
> [I]nformation which demonstrates a chain of related events covering a broad span of time continuing to the current period may furnish a most reliable indicia of present activity, thereby clearly demonstrating that probable cause exists for the order to intrude.
>
> . . . .
>
> "In general, the basic criterion as to the duration of probable cause is the inherent nature of the crime. . . . [I]f an affidavit recites activity indicating protracted or continuous conduct, time is of less significance."

United States v. Haimowitz, 706 F.2d 1549, 1554-55 (11th Cir. 1983) (quoting *United States v. Weinrich*, 586 F.2d 481, 491 (5th Cir. 1978), *cert. denied*, 441 U.S. 927 (1979)), *cert. denied*, 464 U.S. 1069 (1984). *See also United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir.), *cert. denied sub nom. Hoskins v. United States*, 469 U.S. 1073 (1984). Based on the continuous nature of the criminal conduct being investigated, it was not unreasonable for the issuing magistrate to conclude that

documents involved in the odometer-tampering scheme would be found in the Hensons' office on the date Inspector Edwards applied for the search warrant (May 21, 1985). *See Haimowitz*, 706 F.2d at 1555.

C

We also reject the defendants' contention that the search warrant issued by the magistrate did not describe with particularity the items to be searched for and seized, in conformity with the Fourth Amendment. The warrant authorized the police to search for:

> any and all records, but not limited to modules, modems and connectors, computer, computer terminals, hard copy user documentation pertaining to files and/or programs, cables, printers, discs, floppy discs, tapes, vendor phone numbers, all original and backup tapes and discs, any other informational data input, all vendor manuals for hardware and software, printouts, receipt books, ledger books, ledger cards, records of sales, odometer statements, file records on individual used car dealers, file records, payment receipts, bank transaction records, invoices regarding the purchase of used vehicles, automobile auction company records and/or lists, any correspondence from auto auction companies, and any motor vehicle titles for the period from June 1983 through the present, including but not limited to the following individuals and companies:
>
> > Clinton [*sic*] Henson, Henson Motor Company, Sheila Henson Lutz, Allen [*sic*] Henson, Ronnie Walston and/or Walston Used Cars, Charles Haley and/or Haley Used Cars, Charlie Aldridge, 79 Motors, Bob Pugh, Ralph Lutz, Shane Howard and T. S. Motors.
>
> Also, any other used car dealers conducting business with Henson Motor Co., and/or Allen [*sic*] Henson.

> It is also requested that the vehicle identification number and/or tag number be recorded on any vehicles found in the parking lot surrounding the building.

General warrants that fail to describe with particularity the things to be searched for and seized "create a danger of unlimited discretion in the existing officer's determination of what is subject to seizure and a danger that items will be seized when the warrant refers to other items." *United States v. Savoca*, 761 F.2d 292, 298-99 (6th Cir.), *cert. denied*, 474 U.S. 852 (1985). *See Andresen v. Maryland*, 427 U.S. 463 (1976). However, the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought." Thus a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit." *United States v. Blum*, 753 F.2d 999, 1001 (11th Cir. 1985) (citation omitted).

In the instant case, although the warrant uses generic terms, Inspector Edwards could not have known at the time he applied for the warrant that precise records and files would contain information concerning the odometer-tampering scheme." Where the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice." *United States v. Porter*, 831 F.2d 760, 764 (8th Cir. 1987) (quoting *United States v. Johnson*, 541 F.2d 1311, 1313 (8th Cir. 1976)), *cert. denied*, —— U.S. ——, 108 S.Ct. 1037 (1988). The description in the warrant is directed toward items likely to provide information concerning the Hensons' involvement in the odometer-tampering scheme and therefore did not authorize the officers to seize more than what was reasonable under the circumstances.

Indeed, the breadth of the warrant here actually weighs in favor of admitting the evidence. Because the warrant

in this case was "inclusive," it did not leave room for the officers to exercise unlimited discretion. *See Savoca*, 761 F.2d at 299. If we ask, as this court did in *Savoca*, whether there was probable cause to support a search of this breadth, we would have no hesitation in concluding that there was.

The defendants argue that the warrant should have been limited to the 76 automobiles involved in Inspector Edward's survey. His affidavit suggested an ongoing scheme to purchase automobiles and resell them with tampered odometers. Edwards had good reason to believe that some of the vehicles, and their accompanying documents, identified during the survey would no longer be on the premises when the warrant was executed, while others would have been added. In short, the warrant in this case was as "specific as the nature of the activity under investigation permitted." *United States v. Shoffner*, 826 F.2d 619 (7th Cir.) (citation omitted), *cert. denied sub nom. Stange v. United States*, —— U.S. ——, 108 S.Ct. 356 (1987).

Additionally, we note that other courts have approved warrants at least as general as the one attacked here. *See, e.g., Shoffner*, 826 F.2d at 630-31 (and cases cited therein). We thus conclude that the warrant was reasonably specific under the circumstances of this case.

D

Lastly, we find no merit to the defendants' contention that the search went "flagrantly" beyond the scope of the warrant; that "Edwards engaged in a seizing frenzy, confiscating office supplies, blank paper, horse records, divorce records, and personal income tax records without a time limitation or any other limitation."

A search does not become invalid merely because some items not covered by a warrant are seized. *United States v. Lambert*, 771 F.2d 83 (6th Cir.), *cert. denied*, 474

U.S. 1034 (1985). This is especially true where the extra-warrant items were not received into evidence against the defendant. *United States v. Shilling*, 826 F.2d 1365, 1369 (4th Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 777 (1988). Absent flagrant disregard for the limitations of a search warrant, the items covered by the warrant will be admissible. *Lambert*, 771 F.2d at 93.

In this case, we do no find a flagrant disergard for the terms of the search warrant. Since the extensive seizure of records was authorized by the terms of the warrant, it was inevitable that the officers would seize documents that were not relevant to the proceedings at hand. We do not think it is reasonable to have required the officers to sift through the large mass of documents and computer files found in the Hensons' office, in an effort to segregate those few papers that were outside the warrant. *See Marvin v. United States*, 732 F.2d 669, 675 (8th Cir. 1984).

IV

Clenton Henson attacks his conviction under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981 *et seq.* The Act seeks to prevent "tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers." *Id. at* § 1981. Section 1988(b) states that "[n]o transferor shall . . . give a false statement to a transferee in making any disclosure" of the cumulative mileage registered on odometers. A "transefor" is defined as "any person who transfers ownership in a motor vehicle by sale, gift, or any means other than by creation of a security interest," 49 C.F.R. § 580.3; a "transferee" is "any person to whom the ownership in a motor vehicle is transferred by purchase, gift, or any means other than by creation of a security interest." *Ibid.*

The Act also contains a criminal enforcement provision, under which Clenton was convicted. At times pertinent to this case, section 1990c read:

> Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by such provision shall be fined not more than $50,000 or imprisoned not more than one year, or both.

Clenton Henson argues that he could be convicted under 1990c for giving a false mileage statement to a transferee only if the government proved that he was a "transferor" within the meaning of section 1988(b). He says the district court improperly instructed the jury that he could be found guilty if the government proved that he gave, or *caused a transferor to give*, a false odometer statement to a transferee as alleged in the indictment. In other words, the court instructed the jury that Clenton could be held criminally liable under section 1990c even if he were not a "transferor."

We believe the defendant misreads the pertinent statutory provisions. Section 1990c specifically states that "[a]ny person who knowingly and willfully . . . causes to be done any act that violates any provision of this subchapter," including section 1988(b), will be criminally liable. By using language that is similar to 18 U.S.C. § 2(b), we believe Congress contemplated that similar principles would apply. Under 18 U.S.C. § 2(b), defendants can be convicted as causers, even though they are not legally capable of personally committing the act forbidden by the federal statute and even though the agent caused to do the criminal act was guiltless of the crime. *United States v. Keefer*, 799 F.2d 1115 (6th Cir. 1986); *United States v. Ruffin*, 613 F.2d 408 (2d Cir. 1979).

Thus, even assuming Clenton Henson was not a transferor within the meaning of section 1988(b), the jury

could find that he adopted a transferor's acts and capacity by causing a transferor to commit a criminal act. Consequently, the district court did not err in instructing the jury as it did.[8]

If we were to accept Clenton Henson's interpretation, that only transferors who give or cause to be given a false odometer statement can be convicted, we would create a gaping loophole in the law that would hinder, rather than promote, accurate reporting of mileage information to the consumer. Consider, for example, an automobile dealer's corrupt employee, who alters the odometers statements of his employer's vehicles without the latter's knowledge. Under Clenton Henson's interpretation, this employee could not be convicted under section 1990c because he is not a transferor. We do not believe the Act countenances such an outcome.

Clenton relies on *United States v. Powell*, 806 F.2d 1421 (9th Cir. 1986), which we do not find to be controlling. In that case, Powell, a sales manager for a company that bought cars at auction and resold them to used car retailers, arranged the sale of used cars knowing that the odometers had been rolled back. Powell also falsely certified that the odometer readings were accurate. He was convicted of six counts of falsely certifying automobile odometer readings in violation of 15 U.S.C. §§ 1988(b) and 1990c, but the Ninth Circuit reversed his conviction on these counts. The court of appeals held that, even though Powell willfully provided false mileage information to a transferee, he could not be held liable because he was not a "transferor" within the meaning of section 1988(b). *Id.* at 1423. The court said that Powell may have held himself out as an owner of the vehicles at

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[8] We have examined the legislative history of the Act and do not find any pronouncements inconsistent with the conclusion we reach in this case. *See* S. Rep. No. 155, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 1718; H.R. Rep. No. 764, 94th Cong., 1st Sess. (1975).

issue, arranged the sales and signed the sales certificates as transferor, but he was at all times merely an agent for the true transferor, his employer. *Ibid.*

In *Powell*, the government raised the same argument it makes here; that Powell should be held liable under 1990c because he caused his employer, the transferor, to violate section 1988(b) by furnishing mileage certificates that he knew to be false. *Ibid.* Significantly, the court believed that this "certainly" was a "viable theory," but refused to consider it because the argument was raised for the first time on appeal. *Ibid.* The *Powell* court did not reach the issue we decide here, and we thus do not find it controlling.

After carefully reviewing the record, and making all reasonable inferences favorable to the government, we similarly find no merit to Clenton Henson's contention that there was insufficient evidence to support the jury's verdict that he gave, or caused a transferor to give, false odometer statements. Likewise, we find sufficient evidence to support a finding of venue in the Western District of Kentucky. It is clear from the record that the Henson organization was based in that District, and many of the steps that were integral to the odometer-tampering scheme took place therein.

V

Clenton Henson and Alan Henson argue that the district court improperly enhanced their fines on count one of the indictment, under the Criminal Fine Enforcement Act (CFEA), Pub. L. No. 98-596, 98 Stat. 3137, codified at 18 U.S.C.A. § 3623.[4] Section 3623, entitled "Alternative fines," applies to offenses committed after December 31, 1984. *United States v. Holmes*, 822 F.2d 481, 491 (5th Cir. 1987). Focusing on the overt acts alleged

[4] The CFEA has since been repealed, effective November 1, 1987. Pub. L. 98-473, 98 Stat. 1987.

in count one of the indictment, the last of which occurred on May 19, 1984, the defendants contend the CFEA is inapplicable because the offenses occurred before December 31, 1984. The Act's application, they say, would violate the *ex post facto* clause of the Constitution. U.S. Const. art. I, § 9, cl. 3.

This argument must fail. A jury's verdict represents a finding that a crime was committed as alleged in the indictment, which means in this case "[o]n or about and between January 1, 1983, up to and including January 1, 1985. . . ." *See United States v. Calabrese*, 825 F.2d 1342, 1346 (9th Cir. 1987). Thus, when the jury convicted Clenton Henson on count one, it found that the crimes took place up to and including January 1, 1985. Alan Henson's plea of guilty had the same effect as the jury verdict against Clenton Henson; his plea represents a finding that he was involved in the conspiracy up to and including January 1, 1985.

We also do not find it dispositive that the last overt act alleged in the indictment antedates the effective date of the CFEA. It is axiomatic that all the overt acts in furtherance of a conspiracy need not be alleged in the indictment. *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 1578 (1987). Moreover, there was evidence of other acts that were performed in furtherance of the conspiracy after December 31, 1984. *See United States v. Purther*, 823 F.2d 965, 968 (6th Cir. 1987) (restitution was available with respect to mail fraud scheme which continued after the effective date of the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3580 (1982), even though the overt acts alleged in the indictment were performed before the effective date). For example, Ronald Walston testified that he continued to deal with Sheila Lutz in the early part of 1985 in connection with the odometer-tampering scheme. Carol Lindsey stated that she noticed mileage discrepancies in

the documents she was handling during the first part of 1985. Moreover, when federal agents searched the Hensons' business office in May 1985, they found numerous blank odometer statements listing the names of "false" dealers. Hence, the district court did not err in applying the increased penalties of the CFEA, which were applicable on January 1, 1985.

Because of the foregoing analysis, we necessarily reject the Hensons' contention that the enhancement of their fines under the CFEA violated the constitutional prohibition against *ex post facto* laws. Where, as in this case, a crime is still being carried on and continued after the date when the Act became effective, a statute imposing a greater penalty for conspiracy does not violate the *ex post facto clause*. *United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

Having considered the defendants' remaining contentions, including their challenge to the jury instructions, and finding them to be without merit, we AFFIRM all the convictions and the sentences.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. KENTUCKY
PADUCAH DIVISION

Crim. No. 86-00006-01-P

UNITED STATES OF AMERICA,
Plaintiff,

v.

J. CLENTON HENSON, DENNIS HENSON, C. ALAN HENSON, GARY RAY, RALPH LUTZ, SHELIA LUTZ,
Defendants.

July 13, 1987

Joseph Whittle, U.S. Atty., Duane Schwartz, David P. Grise, Asst. U.S. Attys., Louisville, Ky., for plaintiff.

Thomas Lee Osborne, Osborne & Harris, Paducah, Ky., for J. Clenton Henson.

Gary Haverstock, Murray, Ky., for Shelia Lutz.

MEMORANDUM OPINION

JOHNSTONE, Chief Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is before the court on motions of defendants J. Clenton Henson and Shelia Henson Lutz, for bail pending appeal. Jurisdiction exists under 18 U.S.C. Sect. 3143(b) (2), 28 U.S.C. Sect. 1331.

On January 1, 1987, defendant J. Clenton Henson was convicted of one count of conspiracy to commit mail fraud in violation of 18 U.S.C. Sect. 1341, and of six counts of giving or causing to be given false odometer statements in violation of 15 U.S.C. Sects. 1988(b), 1990c. Defendant Shelia Lutz was convicted of one count of conspiracy to commit mail fraud. The defendants were sentenced on January 22, 1987, with J. Clenton Henson receiving a sentence of four years in prison and a fine of $360,000, and Shelia Lutz one year in prison and a fine of $10,000. The defendants then moved for bail pending appeal of their convictions.

According to the Bail Reform Act of 1984, 18 U.S.C. Sect. 3143(b), bail pending appeal is proper if the defendant establishes the following:

> (1) that the defendant is not likely to flee or pose a danger to the safety of other persons or communities if released;
>
> (2) that the appeal is not for the purpose of delay;
>
> (3) that the appeal raises substantial questions of law or fact;
>
> (4) that if the substantial questions are determined in defendants' favor on appeal, the decision is likely to result in a reversal or an order for a new trial.

See United States v. Miller, 753 F.2d 19, 21-22 (3d Cir. 1985); *United States v. Pollard*, 778 F.2d 1177, 1181 (6th Cir.1985).

The court conducted a hearing on this motion on July 7, 1987, at which counsel for the United States and the defendants presented arguments and testimony relating to these four factors. After considering the evidence presented at the hearing and after reviewing the law relied on by both parties, the court makes the following findings.

LIKELY TO FLEE/DANGER TO COMMUNITY

The court finds that neither defendant J. Clenton Henson, nor defendant Shelia Lutz, is likely to flee, or poses a danger to others or to the community. Both defendants are lifelong residents of Marshall County, Kentucky and the families of both defendants reside in that area. J. Clenton Henson is involved in at least three businesses in the western Kentucky area, and has disassociated himself from many prior business interests outside of Kentucky. Shelia Henson is employed with at least three businesses in western Kentucky. Both defendants have been permitted to leave the area on occasions since their sentencing, and have returned. Both have also attended every hearing in this case and have reported to the probation officer on all required occasions. The court also notes that the United States does not contend that these defendants are likely to flee.

These defendants were not convicted of violent crimes, and the court does not buy the government's tenuous argument that they remain a danger to the community. The government has presented no evidence in support of this theory. Therefore, the court finds that neither defendant is likely to flee and that neither poses a danger to others or to the community.

PURPOSE OF DELAY

The court finds that this appeal was not filed for the purpose of delay. Defendants' counsel raise several viable arguments in support of their appeal, and the United States does not contend that the appeals were filed for the purpose of delay.

SUBSTANTIAL QUESTIONS/LIKELY TO RESULT IN REVERSALS

The most difficult determination in this four-part analysis requires the court to decide whether its previous evidentiary rulings pose substantial questions of law or

fact which are likely to be reversed on appeal. This is a two-part analysis, involving first a determination that the questions are substantial, and second, a determination that the questions are "so integral to the merits of the conviction . . . that a contrary appellate holding is likely to require reversal . . . or a new trial." *United States v. Miller*, 753 F.2d at 23.

The court in *Miller* defined a "substantial" question as either a novel question, one that has not been decided by controlling precedent, or one which is fairly doubtful. 753 F.2d at 23.

Defendants raise several issues on appeal which they contend constitute substantial questions likely to be reversed on appeal. The court will address only two of the alleged errors raised by defendants, inasmuch as those points are dispositive of the court's ruling on this motion.

1. *Conspiracy to commit mail fraud*

Defendants claim that the mailings relied on by the government for their convictions under 18 U.S.C. Sect. 1341 were innocent mailings and not "for the purpose of executing" the schemes required by the statute. The mailings in this case were checks mailed from the Bank of Marshall County to other places to pay for the automobiles subsequently used in the odometer rollback schemes.

After reviewing the case law relied on by the parties, the court is unpersuaded that it erred by permitting the government to pursue the conspiracy convictions based on the mailing of the checks. However, the court does concede that the issue as presented by the defendants is a substantial one, within the meaning of the Bail Reform Act of 1984, for the following reasons.

In *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), members of a school board district embezzled school tax monies received from taxpay-

ers. The mailings relied on for mail fraud convictions were the tax notices which were mailed to the taxpayers. The court held that the mailings were not part of a scheme to use the mails to defraud because the school board was required by state law to mail the tax notices. 80 S.Ct. at 1183.

The holding in *Parr* was expanded *in United States v. Tarnopol*, 561 F.2d 466 (3d Cir.1977), where the court chose to equate routine mailings required by law (as in *Parr*), with "those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise." 561 F.2d at 472. In *Tarnapol*, the mailings at issue were packing slips mailed by an innocent third party to the defendants as a routine part of the record-selling business. Some of the packing slips received were recorded on the defendants' books as sales, while others were withheld and the money was pocketed. The court held that the mailings were not part of a scheme to use the mails to defraud because they were intrinsically innocent and part of the regular business routine.

Finally, the court must note *United States v. Castile*, 795 F.2d 1273 (6th Cir. 1986), where the court appears to broaden the *Tarnopol* interpretation of mailings used for the purposes of executing a scheme to defraud. In *Castile*, the court held as follows:

> This test of dependence does not demand that the use of the mails rather than of a private messenger or other means was itself essential to the fraudulent scheme or that 'the success of the scheme actually depended on the mailings in a "but for" sense.' . . . It instead requires that the thing mailed was an integral part of execution of the scheme so that the use of the mails was in this way '*incident* to an essential part of the scheme.'

795 F.2d at 1278 (emphasis added).

Therefore, under the *Castile* analysis, the mailing need only be *incident* to the scheme in order to be in furtherance of a scheme to defraud. Despite this interpretation, the court notes that the facts of *Castile* are quite divergent from the facts at hand. To the contrary, while the law of *Tarnopol* appears inconsistent with that of *Castile*, the facts of *Tarnopol* are remarkably similar to this case. Therefore, the court finds that the issue has not been decided by controlling precedent, and therefore, constitutes a substantial question of law.

The court also finds that if defendants prevail on this issue on appeal, it is likely that their convictions for conspiring to commit mail fraud will be reversed, or that a new trial will be ordered.

2. *Odometer rollbacks.*

Defendant J. Clenton Henson was also convicted of giving or causing to be given false odometer standards in violation of 15 U.S.C. Sects. 1988(b) and 1990c. Defendant claims that this conviction should be reversed because he is not a "transferor" within the meaning of Sect. 1988(b) and because Sect. 1990c is merely a penalty provision, and not a provision establishing a separate substantive offense for a person other than a transferor.

The court has located only one case which mentions this issue, *United States v. Arthalony*, 559 F.Supp. 1385, 1386 (C.D.Ill.1983), but finds that discussion nonessential to the holding, and thus, dicta. Therefore, the issue has not been decided and the court considers this to be a novel question of substantial importance. *United States v. Miller*, 753 F.2d at 23. If the appellate court rules Sect. 1990c is a penalty provision only, and that the government was required to prove that defendant Henson was a transferor within the meaning of Sect. 1988(b), then Henson's conviction on six counts under those sections is likely to be reversed, or ordered retired. There-

fore, this issue poses a substantial question likely to be reversed.

In conclusion, the court finds that both the conspiracy to commit mail fraud and the odometer rollback issues are substantial, and likely to be reversed within the meaning of *United States v. Miller*. Both defendants were convicted of the conspiracy charge and defendant Henson was convicted of the odometer rollback scheme. Therefore, reversal on either issue could result in reversal of both convictions or a new trial and defendants are entitled to bail pending their appeals.

An appropriate order shall accompany this memorandum opinion.

ORDER

In accordance with the memorandum opinion this date entered, the court renders the following findings concerning defendants J. Clenton Henson and Sheila Lutz:

1. Defendants are not likely to flee the jurisdiction, and pose no danger to others or the community;

2. Defendants' appeals were not filed for the purposes of delay;

3. Defendants raise substantial questions of law on appeal; and

4. If those questions are determined favorably to defendants on appeal, the decision is likely to result in reversal or an order for a new trial. Accordingly,

IT IS ORDERED that defendants' motions for bail pending appeal are GRANTED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 87-5132/5138

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

J. CLENTON HENSON, (87-5132),
SHELIA LUTZ, (87-5138),
Defendants-Appellants.

[Filed July 28, 1988]

ORDER

Before: NELSON and BOGGS, Circuit Judges; EDWARDS, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellants, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/[Illegible]
LEONARD GREEN
Clerk

APPENDIX D

RULING ON MOTION TO SUPPRESS

THE COURT: The Court has conducted a suppression hearing, considered all matters here before involved in the search warrant issue do novo.

The Court finds that the affidavit in fact does allege sufficient facts creating probable cause for such search warrant, and that it does demonstrate a substantial basis for the existence of probable cause.

The Court further finds that the affidavit of Lee Edwards stated facts sufficient to show criminal activity and that the search could reasonably be conducted.

The Court believes that the *United States v. Leon*, if read in its entirety, supports the issuance of a warrant by Judge Long. I believe the search warrant provided an attached (sic) scrutiny of a neutral magistrate, and therefore the motion to suppress is denied.

MR. OSBORNE: Your Honor, in denying the motion to suppress, you're also finding that the search warrant did satisfy the particularity requirement of the Fourth Amendment in detailing the sealed to be seized, is that correct?

THE COURT: Having considered the evidence at this hearing, including the photographs and the statement of the defendant—

MR. OSBORNE: And the warrant itself.

THE COURT: The Court finds that the execution of search warrant was reasonable under the circumstances.

MR. OSBORNE: And that the search did not exceed any demonstration of probable cause set out in the affidavit. That covers all my issues.

THE COURT: Yes, sir. I so find that. If it exceeded the limits of the search warrant because of the voluminous material that was relevant in the case, I do not believe the officers were required at that time to go though each of the many, many boxes of files to pull out what was personal or otherwise.

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-514

In the Supreme Court of the United States

OCTOBER TERM, 1988

J. CLENTON HENSON AND SHEILA HENSON LUTZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the warrant that authorized the search of petitioners' business office was sufficiently particular under the Fourth Amendment.

2. Whether petitioner Henson was properly convicted under 15 U.S.C. (& Supp. IV) 1990c(a) for causing the transferors of motor vehicles to give false statements to the transferees concerning the cumulative mileage registered on the vehicles' odometers.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-514

J. CLENTON HENSON AND SHEILA HENSON LUTZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 848 F.2d 1374.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1988, and a petition for rehearing was denied on July 28, 1988 (Pet. App. 31a). The petition for a writ of certiorari was filed on September 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners J. Clenton Henson and Sheila Lutz were convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. Petitioner Henson was also convicted on six

counts of causing a transferor of an automobile to give a false odometer statement to a transferee, in violation of 15 U.S.C. 1990c(a).[1] Henson was sentenced on the conspiracy count to a four-year term of imprisonment and a fine of $120,000. He was also sentenced to one-year terms of imprisonment on the Section 1990c(a) violations, which were made to run concurrently with each other and with his sentence on the conspiracy count. Lutz was sentenced to a one-year term of imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. 1a-23a).

1. The evidence at trial is summarized in the court of appeals' opinion (Pet. App. 2a-6a). It showed that petitioners were involved in an extensive odometer-tampering scheme. Petitioner Henson and others would purchase large numbers of late-model, high-mileage automobiles and resell them to local dealers for resale to the public. For a fee of $50 or $100, Henson would provide the dealers with an odometer statement that understated the automobiles' true mileage. Henson would also use a variety of methods to conceal the odometer scheme, including altering or fabricating the original title certificates. To accomplish that, petitioner Lutz and others would forge dealers' names on bills of sale, odometer statements, automobile titles, and registration forms. Pet. App. 2a-5a.

During their investigation of the odometer scheme, federal and state law enforcement officials executed a search warrant at petitioners' business premises in Benton, Kentucky (Pet. App. 6a). In an affidavit submitted in support of the application for the warrant, a postal inspector

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[1] Henson was acquitted on four counts of mail fraud under 18 U.S.C. 1341. The government dismissed a fifth mail fraud count during trial. Henson was also acquitted on four other counts charging violations of 15 U.S.C. 1990c(a). Lutz was acquitted on five counts of mail fraud.

described the 15-month investigation culminating in the request for the warrant. The inspector explained, in particular, that he had personally investigated 76 automobiles that petitioners had purchased in California from June through December 1983. For each of those cars, the inspector reviewed the titles and auction invoices obtained from the California auctioneers and compared them with the corresponding Kentucky registrations, title applications, inspection forms, and odometer statements. In each case, the inspector stated, the mileage listed in the Kentucky documents was significantly lower than the mileage stated in the California documents. *Id.* at 10a-11a. The affidavit for the warrant also recounted the inspector's conversations with two automobile dealers, who reported that petitioners had routinely offered them false odometer statements in return for a set fee (*id.* at 11a-12a). On the basis of those allegations, the magistrate issued a warrant to search petitioners' business premises for "any and all records" including, but not limited to, specific items relating to the odometer scheme.[2]

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[2] In full, the warrant authorized the police to search for (Pet. App. 15a-16a):

> any and all records, but not limited to modules, modems and connectors, computer, computer terminals, hard copy user documentation pertaining to files and/or programs, cables, printers, discs, floppy discs, tapes, vendor phone numbers, all original and backup tapes and discs, any other informational data input, all vendor manuals for hardware and software, printouts, receipt books, ledger books, ledger cards, records of sales, odometer statements, file records on individual used car dealers, file records, payment receipts, bank transaction records, invoices regarding the purchase of used vehicles, automobile auction company records and/or lists, any correspondence from auto auction companies, and any motor vehicle titles for the period from June

2. The court of appeals affirmed (Pet. App. 1a-23a). The court rejected the contention (*id.* at 15a-17a) that the search warrant was insufficiently particular. It noted that the inspector's affidavit "suggested an ongoing scheme to purchase automobiles and resell them with tampered odometers," and the court had "no hesitation" concluding that "there was probable cause to support a search of this breadth" (*id.* at 17a). In short, the court found (*ibid.* (citation omitted)), "the warrant in this case was as 'specific as the nature of the activity under investigation permitted.' " The court also rejected (*id.* at 18a-21a) petitioner Henson's contention that he was improperly convicted under 15 U.S.C. (& Supp. IV) 1990c(a) because he was not a "transferor" of an automobile. The court explained that even if Henson was not himself a "transferor," he was nevertheless within the ambit of Section 1990c(a) because he had *caused* a transferor to make a false statement concerning the mileage of the automobiles (Pet. App. 19a-20a).[3]

1983 through the present, including but not limited to the following individuals and companies:

> Clinton [*sic*] Henson, Henson Motor Company, Sheila Henson Lutz, Allen [*sic*] Henson, Ronnie Walston and/or Waltson Used Cars, Charles Haley and/or Haley Used Cars, Charlie Aldridge, 79 Motors, Bob Pugh, Ralph Lutz, Shane Howard and T.S. Motors.

Also, any other used car dealers conducting business with Henson Motor Co., and/or Allen [*sic*] Henson. It is also requested that the vehicle identification number and/or tag number be recorded on any vehicles found in the parking lot surrounding the building.

[3] The court of appeals also held that the mails had been used for the purpose of executing the odometer tampering scheme; that the affidavit in support of the warrant did not contain material misrepresentations; that the information contained in the affidavit was not stale; that in executing the search, the officers did not impermissibly exceed

ARGUMENT

1. Petitioners first contend (Pet. 9-16) that the search warrant was insufficiently particular and that the warrant should have limited the search to the files relating to the 76 automobilies that the inspector had investigated. The court of appeals correctly rejected that contention.

The Fourth Amendment particularity requirement is designed to prevent " 'general, exploratory rummaging in a person's belongings.' " *Andresen* v. *Maryland,* 427 U.S. 463, 480 (1976) (quoting *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971)). But where the underlying affidavit establishes sufficiently broad probable cause, the warrant may authorize a comparably broad search and seizure. For example, in *United States* v. *Bright,* 630 F.2d 804 (5th Cir. 1980), the defendant contended that a search warrant should have been limited to currency bearing particular serial numbers, in view of the fact that the government knew before the search that currency with those serial numbers would be found in the defendant's house. Rejecting that contention, the Fifth Circuit held that because the government had established probable cause to search for more than those specific bills, the warrant was entitled to encompass all currency in the defendant's possession. 630 F.2d at 811-812.

More recently, the Eighth Circuit made the same point in *United States* v. *Kail,* 804 F.2d 441 (1986). There, the court upheld a warrant that permitted the seizure of "almost all of the [defendant's] business records." The court reasoned that "there was probable cause to believe

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the terms of the warrant; and that the district court did not improperly enhance certain of the fines under the Criminal Fine Enforcement Act, 18 U.S.C. 3623 (now repealed). Pet. App. 7a-15a, 17a-18a, 21a-23a. The petition does not present any of those issues.

that fraud permeated the entire business operation." 804 F.2d at 445.

The First Circuit took the same view in *United States* v. *Brien,* 617 F.2d 299, cert. denied, 446 U.S. 919 (1980). In that case the court of appeals approved a warrant that concededly covered most of the defendant's business records (617 F.2d at 306). The court determined that the affidavit in support of the warrant showed that the defendant's fraud was "so extensive as to justify a belief by the magistrate that all these documents were likely to constitute evidence of the crimes under investigation" (*ibid.*). Like petitioner, the defendant in *Brien* contended that the warrant should have been limited to particular customers about whom the authorities had specific information. The First Circuit rejected that claim, noting (*id.* at 307-308) that there was a sufficient basis to believe that the defendant had engaged in similar practices with his other customers. Accord *United States* v. *Sawyer,* 799 F.2d 1494, 1508 (11th Cir. 1986), cert. denied 479 U.S. 1069 (1987) (holding that evidence of pervasive fraud justified a warrant that was not limited to the 25 transactions specified in the affidavit); *United States* v. *McClintock,* 748 F.2d 1278 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985); *United States* v. *Offices Known as 50 State Distributing Co.,* 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *United States* v. *Hillyard,* 677 F.2d 1336 (9th Cir. 1982); *National City Trading Corp.* v. *United States,* 635 F.2d 1020 (2d Cir. 1980).

Here, the warrant (Pet. App. 15a-16a) authorized the agents to seize the records found on petitioners' business premises. The court of appeals' fact-bound determination (*id.* at 17a) that there was sufficient probable cause to justify such a search is correct.[4] The affidavit did not

[4] In assessing the sufficiency of probable cause this Court has made it clear that the issuing magistrate is to "make a practical, common-

simply disclose 76 discrete instances of odometer tampering. Rather, the affidavit showed that petitioners routinely offered dealers fraudulent odometer statements. Thus, the issuing magistrate was entitled to infer that the 76 profiled cases of understated odometer readings represented merely "the tip of the iceberg" (*United States* v. *Brien*, 617 F.2d at 308).

The court of appeals' decision is not in conflict with this Court's decision in *Andresen* v. *Maryland, supra.* In that case, the Court held that a general phrase in certain warrants, authorizing the police to search for "other fruits, instrumentalities and evidence of crime" (463 U.S. at 479), must be read in context with the full text of the warrants, which authorized the search for and seizure of material relevant only to petitioner's activities in connection with a particular real estate conveyance. The Court did not hold, however, that a search warrant must be confined to a particular transaction or to a particular offense. Nothing in the *Andresen* case precludes the government from conducting an area-wide search of a business's premises where, as here, there is probable cause to believe that the entire business is permeated by fraud.

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sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). A reviewing court need only ensure that the magistrate had a "substantial basis" for finding that probable cause existed (*id.* at 238-239), bearing in mind that affidavits are to be reviewed "in a commonsense and realistic fashion" (*United States* v. *Ventresca*, 380 U.S. 102, 108-109 (1965)), and that the judgment of the issuing magistrate is entitled to considerable deference (*Ventresca*, 380 U.S. at 109; *United States* v. *McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986); *United States* v. *Ellison*, 793 F.2d 942, 946 (8th Cir.), cert. denied, 479 U.S. 937 (1986); *United States* v. *Lamport*, 787 F.2d 474, 476-477 (10th Cir.), cert. denied, 479 U.S. 846 (1986); *United States* v. *Travisano*, 724 F.2d 341, 345 (2d Cir. 1983)).

Petitioners' reliance (Pet. 12-13) on the Eighth Circuit's decisions in *In re Grand Jury Proceedings*, 716 F.2d 493 (1983), and *Rickert* v. *Sweeney*, 813 F.2d 907 (1987), and the First Circuit's decision in *United States* v. *Abrams*, 615 F.2d 541 (1980), is also misplaced. In those cases the courts of appeals found that the warrants exceeded the breadth of the underlying probable cause. See *In re Grand Jury Proceedings*, 716 F.2d at 498-499; *Rickert*, 813 F.2d at 909; *Abrams*, 615 F.2d at 544 & n.7.[5] The same courts have made clear, however, that "[a]ll business records may be seized * * * if probable cause exists to believe that the entire enterprise has engaged in a pervasive scheme to defraud" (*Rickert*, 813 F.2d 909; accord *United States* v. *Kail*, 804 F.2d 441, 445 (8th Cir. 1986); *United States* v. *Brien*, 617 F.2d at 306). Applying that standard in the present case, the court of appeals found that the inspector's affidavit "suggested an ongoing scheme to purchase automobiles and resell them with tampered odometers" (Pet. App. 17a). The court therefore concluded that "there was probable cause to support a search of this breadth" (*ibid.*). That fact-bound determination warrants no further review.

2. Petitioner Henson contends (Pet. 16-19) that he was unlawfully convicted under 15 U.S.C. (& Supp. IV) 1990c(a). That statute attaches criminal liability for violations of other provisions of the statute. In this case, petitioner was charged under 15 U.S.C. 1988(b), which prohibits a "transferor" of a motor vehicle from making a

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[5] The Ninth Circuit noted a similar infirmity when it invalidated the search warrant in *United States* v. *Cardwell*, 680 F.2d 75 (1982). The court explained that, based on the underlying investigation, " 'the government knew exactly what it needed and wanted and where the records were located.' " Accordingly, the court reasoned, " '[t]here was no necessity for a massive re-examination of all records bearing on income and expenses.' " *Id.* at 78 (citation omitted).

false representation to a transferee about the mileage of the vehicle. Petitioner contends that he was not a "transferor" of automobiles and that he therefore did not fall within the reach of Section 1988(b). For that reason, he argues, the criminal sanctions of Section 1990c(a) cannot be imposed against him.

The court of appeals correctly rejected that contention. By its terms, Section 1990c(a) applies not only to persons who violate other provisions of the Act, such as Section 1988(b), but also to persons who "cause" acts to be done that violate those provisions. In this case, petitioner Henson caused others to make false statements to transferees regarding the cumulative mileage registered on odometers. That conduct constituted causing acts to be done that violated Section 1988(b), and thus was subject to the criminal sanctions of Section 1990c(a). As the court of appeals noted (Pet. App. 19a-20a, 21a), there was sufficient evidence for the jury to find that Henson "adopted a transferor's acts and capacity by causing a transferor to commit a criminal act" (*id.* at 20a).

The Ninth Circuit's decision in *United States* v. *Powell*, 806 F.2d 1421 (1986), is not to the contrary. As the court below noted (Pet. App. 20a-21a), and as petitioner acknowledges (Pet. 18 n.21), the Ninth Circuit in *Powell* agreed that it is "certainly" a "viable theory" to charge a defendant under Section 1990c(a) with having caused a transferor to make a false statement of mileage; but because the government in the *Powell* case had not raised that claim in the lower court, and because the indictment and the jury instructions had identified the defendant as a transferor, the court refused to reach the merits of the government's contention. Finally, petitioner contends (Pet. 19) that unlike Section 1988(b), which does not apply to persons who cause a false statement to be made, 15 U.S.C. 1984 expressly covers persons who "cause" an

odometer to be altered. The fact that petitioner might also have been prosecuted under that statute, however, is not a reason to ignore the plain language of Section 1990c(a). And it is under Section 1990c(a) that petitioner was convicted for causing a transferor to violate Section 1988(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

J. CLENTON HENSON and SHEILA HENSON LUTZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In the petition, we argued that ordinarily a search warrant for "any and all records" of a business violates the particularity requirement of the Fourth Amendment. We showed that the decision below, upholding the use of such a warrant, conflicts with the decisions of this Court and other courts of appeals which have upheld broadly phrased warrants only where such warrants limited the scope of a search to particular transactions, a particular criminal offense or a specific category of documents. The United States, in its opposition, distorts petitioners' argument by suggesting that petitioners would require all searches to be limited to specific transactions. Moreover, the United States has abandoned entirely the reasoning of the decision below and now argues that the warrant

was appropriate because petitioners' business was "permeated with fraud."

1. The primary flaw with the United States' Opposition is that it has rejected the theory upon which it—and the court of appeals—relied below and now argues that the general warrant was permissible because petitioners' business was "permeated with fraud." Br. in Opp. 7. However, it is not this newly articulated theory that is before this Court, but rather the court of appeals' published opinion upholding the warrant as sufficiently particular. As petitioners noted previously (Pet. 14 n.15), a "pervasive fraud" argument is inappropriate in this case because neither the district court nor the court of appeals found that there was probable cause to believe that petitioners' business was permeated with fraud.[1]

In the absence of the required finding by the Sixth Circuit that petitioners' business was pervasively fraudulent, the United States attempts to rely upon the Sixth Circuit's statements that "the affidavit suggested an ongoing scheme to purchase automobiles and resell them with tampered odometers" and that "the warrant in this case was as 'specific as the nature of the activity under investigation permitted.'" Pet. App. 17a. (quoting *United States* v. *Shoffner*, 826 F.2d 619 (7th Cir.), *cert. denied*, 108 S. Ct. 356 (1987).

But the reliance on *Shoffner* is misplaced. In *Shoffner*, the court stated that:

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[1] The United States also suggests that review by this Court is inappropriate in this case involving a "fact-bound determination" that there was sufficient probable cause to justify such a search. Br. in Opp. 6, 8. Of course, the courts below made no determination —"fact-bound" or otherwise—regarding the "pervasive fraud" argument that the United States has now raised. In any event, all Fourth Amendment cases involve relatively fact-intensive analyses and this case clearly presents a substantial and recurring issue of constitutional law regarding the permissible scope of searches for any and all business records.

> The affidavit in this case averred a continuing criminal scheme involving stolen automobiles. Law enforcement authorities had every reason to believe that some of the vehicles named in the affidavit would no longer be on the premises when they executed the search warrant, and that others would have been added. In sum, the warrant in this case was as "specific as [the circumstances and] the nature of the activity under investigation permit[ted]."

826 F.2d at 631 (quoting *United States* v. *Blum*, 753 F.2d 999, 1001 (11th Cir. 1985).

The warrant in *Shoffner*, however, was specifically limited to "documentation concerning the purchase, sale, ownership, titling and licensing of stolen motor vehicles." 826 F.2d at 630. Thus, the warrant included two specific limits: first, it identified particular criminal activity, which this Court cited in *Andresen*, and second, it identified broad categories of documents upon which other courts of appeals have relied. *See Andresen* v. *Maryland*, 427 U.S. 463 (1976). The Sixth Circuit's—and the United States' —reliance on *Shoffner* emphasizes that (1) the warrant at issue clearly was impermissibly broad and unnecessarily so; and (2) this was not a case in which the pervasively fraudulent nature of the business made it impossible to narrow the scope of the warrant.

Finally, all of the evidence relied upon by the government to demonstrate the "pervasive" nature of the fraud relates to the narrow class of the 76 specific transactions (*i.e.*, the automobiles purchased in California) that had been investigated by the government. Br. in Opp. 3. The United States' suggestion that this constitutes evidence of "pervasive fraud" would turn this "rare" exception (Pet. 14 n.15) to the particularity requirement of the Fourth Amendment into the general rule.

2. In this case, the Sixth Circuit upheld a warrant authorizing a search for and the seizure of all records of a business—a warrant with *no* limitations. In *Andresen*,

this Court rejected a claim that the scope of a search warrant was too broad to satisfy the particularity requirement of the Fourth Amendment by expressly relying upon the fact that the warrant was limited to documents relating to a particular transaction and to a particular offense. Pet. 9-12. The United States simply asserts, without explanation, that "[n]othing in the *Andresen* case precludes the government from conducting an area-wide search . . . ." Br. in Opp. 7. However, it is clear from the decision in *Andresen* that, without the limitations contained in the search warrant, that warrant would not have withstood scrutiny under the Fourth Amendment.

Contrary to the United States' repeated assertion (Br. in Opp. 5, 7), petitioners do not suggest that there was only one permissible method by which the scope of the warrant could have been circumscribed. Rather, petitioners pointed to three separate limitations that courts have relied upon to uphold warrants that would otherwise be impermissible: limitations based upon specific transactions, specific offenses or particular categories of documents. Pet. 12. For example, in this case, the magistrate could have limited the scope of the search to the 76 specific transactions that had been investigated, just as the warrant in *Andresen* was limited to a single transaction. Or somewhat more broadly, the government could have restricted the warrant to all transactions involving California auto auction dealers. Pet. App. 11a. Similarly, the warrant could have been limited to the specific offenses that prosecutors were investigating—mail fraud and odometer tampering.[2] In addition, the search could

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[2] Other circuits have, in certain situations, upheld broadly phrased warrants for records limited to specific criminal activity. *See, e.g., United States* v. *Timpani*, 665 F.2d 1, 4-5 (1st Cir. 1981) (records relating to "gambling and loansharking"); *United States* v. *Fannin*, 817 F.2d 1379, 1383 (9th Cir. 1987) (documents relating to drug trafficking).

have been limited to certain categories of documents.[3] The United States simply ignores the absence of these limits.

The United States also fails to distinguish adequately the cases in other circuits with which the decision of the court below conflicts. Decisions in three other circuits have struck down warrants with language nearly identical to that approved by the Sixth Circuit. *See* Pet. 12-14. Curiously, the United States claims that petitioners' reliance on *United States* v. *Abrams*, 615 F.2d 541 (1st Cir. 1980), is "misplaced." Br. in Opp. 8. That decision is neither cited nor relied upon by petitioners. Instead, the conflict is between the opinion below and the First Circuit's opinion in *United States* v. *Roche*, 614 F.2d 6 (1st Cir. 1980). *See* Pet. 13. That case is clearly on point and indistinguishable from the instant case.

3. The petition also presents a substantial issue of statutory interpretation regarding the criminal provisions of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981 *et seq.* Petitioner Henson was convicted for causing a transferor to give someone a false odometer statement. The Sixth Circuit's opinion upholding petitioner's criminal liability is clearly at odds with the Ninth Circuit's decision in *United States* v. *Powell*, 806 F.2d 1421 (9th Cir. 1986), holding that only "transferors" may be convicted under the statutory provisions on which petitioner Henson's conviction was based.

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[3] The United States relies on *United States* v. *Brien*, 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980). In that case, however, the warrant upheld by the First Circuit was limited to categories of documents—"bank statements, cash receipt books, option purchase records, sales material distributed to customers, employee compensation records, customer account records, sales training material and customer lists." *Id.* at 306.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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